

No. 87-680

JEC 24 1987

JOSEPH F. SPANIOLO, JR.
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1987

JOSEPH A. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED

Solicitor General

WILLIAM F. WELD

Assistant Attorney General

PATTY MERKAMP STEMLER

*Attorney**Department of Justice**Washington, D.C. 20530**(202) 633-2217*

QUESTION PRESENTED

Whether the government, in a prosecution under the Hobbs Act, 18 U.S.C. 1951(a), adequately proved that petitioner committed acts of extortion and that those acts affected interstate commerce.



TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

<i>Stirone v. United States</i> , 361 U.S. 212 (1960)	6
<i>United States v. Anderson</i> , 809 F.2d 1281 (7th Cir. 1987) ..	8
<i>United States v. Angelilli</i> , 660 F.2d 23 (2d Cir. 1981), cert. denied, 445 U.S. 910 (1982)	6
<i>United States v. Billups</i> , 692 F.2d 320 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983)	6
<i>United States v. Boulahanis</i> , 677 F.2d 586 (7th Cir.), cert. denied, 459 U.S. 1016 (1982)	8
<i>United States v. Capo</i> , 817 F.2d 947 (2d Cir. 1987)	5
<i>United States v. Culbert</i> , 435 U.S. 371 (1978)	6
<i>United States v. Harding</i> , 563 F.2d 299 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978)	7
<i>United States v. Mattson</i> , 671 F.2d 1020 (7th Cir. 1982) ..	7, 8
<i>United States v. Murphy</i> , 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)	8
<i>United States v. Rabbitt</i> , 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)	6-7
<i>United States v. Starks</i> , 515 F.2d 112 (3d Cir. 1975)	7
<i>United States v. Tuchow</i> , 768 F.2d 855 (7th Cir. 1985) ...	6
<i>United States v. Zemek</i> , 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981)	6

Statutes and rules:

Hobbs Act:

18 U.S.C. 1951(a)	1, 4
18 U.S.C. 1951(b)	4
Fed. R. Crim. P. 52(b)	4
Fed. R. Evid. 404(b)	4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-680

JOSEPH A. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1987. The petition for a writ of certiorari was filed on October 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on eight counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a). He was sentenced to two years' imprisonment, to be followed by five years' probation, and he was ordered to pay \$2,800 in restitution. The court of appeals affirmed (Pet. App. 1a-4a).

1. The evidence at trial showed that petitioner was a union steward for Teamsters Local 249 at the OK Grocery

Company warehouse in Pittsburgh. OK Grocery is the wholesale division of Giant Eagle Markets, Inc., which operates retail grocery stores in three states. During the period covered by the indictment, OK Grocery employed about 130 regular truck drivers, all of whom were members of Local 249. Because of fluctuations in the grocery business, OK Grocery needed a flexible work force that included some part-time drivers and loaders. When additional part-time personnel were needed, they were obtained from one of three sources: Local 249's "extra" list of unemployed drivers and loaders; a 25-man call list of drivers from which OK Grocery's regular full-time drivers were hired; and a personal list kept by the union steward or the committeemen. When the union hiring hall was open (between 5 a.m. and 11 a.m.), additional drivers were drawn from the union's "extra" list. When the union hiring hall was not open, additional drivers were obtained from the 25-man call list and from the steward's personal list. Pet. App. 1a-2a; C.A. App. A83-A90, A102.

OK Grocery had no input into the composition of the union's "extra" list or the steward's personal list. The company made the final selection for the 25-man call list, but the union steward or committeemen sometimes made recommendations. C.A. App. A86, A89-A91.

The evidence showed that petitioner extorted money from drivers in exchange for giving them part-time work or for helping them obtain full-time work. For example, petitioner requested and received \$50 from driver Michael McPaul on five occasions (C.A. App. A110-A111, A119-A123). McPaul made the payments to secure work, and he worked twice as many hours after the payments began as he had before (*id.* at A111, A120, A121, A123).¹

¹ The payments from McPaul formed the basis for petitioner's convictions on Counts 4-8 of the indictment.

Part-time driver Robert Long, who had been unable to obtain full-time work because he had a felony record, offered petitioner \$5,000 to place him on the 25-man call list (C.A. App. A135, A154-A155). Petitioner told Long to "give the money to him, he would take care of it" (*id.* at A154). Long subsequently made four payments to petitioner totaling \$2,300 (*id.* at A158-A161). Thereafter, petitioner told Long that he could not place him on the call list and that he would return the money, but he never did so (*id.* at A162-A163).²

James Gallagher, who was a union steward at a freight company, saw petitioner on a monthly basis at union meetings. During a two-year period Gallagher paid petitioner a total of \$1,250 to ensure that his son, a part-time driver at OK Grocery, obtained steady work (C.A. App. A179-A181, A187, A193, A196). Petitioner complained that the first payment—\$250—"wasn't too much" (*id.* at A189). After subsequent payments, Gallagher's son worked more frequently (*id.* at A190, A193).³

Part-time driver Robert Zadrowski was told by a friend of petitioner's that petitioner wanted \$400. Zadrowski refused to give the friend the money. Shortly thereafter, petitioner arrived at the scene and asked Zadrowski whether he wanted to work and, if so, why he had not paid the money. Zadrowski thereupon gave petitioner \$400. C.A. App. A205-A206. On another occasion, Zadrowski paid petitioner \$250 after petitioner said, "If I don't get the 250, you don't work" (*id.* at A210).⁴

² The payments from Long (three on one day, one on another day) formed the basis for petitioner's convictions on Counts 9 and 10 of the indictment.

³ One of the Gallagher payments formed the basis for petitioner's conviction on Count 1 of the indictment. Petitioner was acquitted on two other counts stemming from the Gallagher payments.

⁴ The payments to Zadrowski did not form the basis for any counts of the indictment because the prosecution was barred by the statute of

2. The court of appeals affirmed petitioner's convictions in an unpublished opinion (Pet. App. 1a-4a). The court held that the government's proof satisfied the jurisdictional element of an effect on interstate commerce, reasoning that the payments made by the truck drivers decreased "the return [they] received for their labor in interstate commerce" (*id.* at 2a-3a). The court also pointed out that "[e]ven payments made indirectly on behalf of truck drivers for work opportunity have a potential effect on interstate commerce" (*id.* at 3a).

ARGUMENT

1. Petitioner contends (Pet. 18) that the evidence was insufficient to establish extortion under the Hobbs Act, 18 U.S.C. 1951(a),⁵ because it did not show that his victims "parted with their property based on fear of economic harm."⁶ According to petitioner (Pet. 13-14), the truck drivers offered him unsolicited bribes to enhance their work prospects, but there was no evidence that they feared they would work fewer hours if they did not pay the money.

Petitioner's analysis of the evidence is incorrect; the government amply established that the extortion victims

limitations; rather, that evidence was admitted under Fed. R. Evid. 404(b) to show petitioner's intent and purpose in accepting the payments.

⁵ Section 1951(a) prohibits "extortion" that affects interstate commerce. Section 1951(b) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

⁶ Petitioner never raised this specific issue in the district court, either in his pretrial motion to dismiss or in his motion for judgment of acquittal. It is therefore subject to review only on a plain error standard. See Fed. R. Crim. P. 52(b).

had a reasonable fear of economic harm. For instance, victim Michael McPaul testified that after he began making payments, he "worked twice as much" as he had before (C.A. App. A123). He was asked at trial, "Sir, did you believe that if you did not pay Mr. Miller that money it would have an adverse affect on your employment?" He replied, "In my mind I did, yeah." *Id.* at A112. Robert Zadrowski testified that he gave petitioner \$250 after petitioner said, "If I don't get the 250, you won't work" (*id.* at A210). Thus, the evidence shows that the extortion victims entertained a reasonable fear of prospective economic harm, and that petitioner sought to exploit that fear in order to induce the victims to make payments to him.

United States v. Capo, 817 F.2d 947 (2d Cir. 1987), upon which petitioner relies, is distinguishable on its facts. *Capo* involved a job-selling scheme at Eastman Kodak. Kodak needed to hire 2,300 people to produce its new disc camera. The company received thousands of job applications and had no organized method of processing them. Ultimately, the applicants who offered money to the defendants were among the 2,300 hired, but "not one witness testified to any fear that nonpayment would result in one of the defendants adversely affecting his or her chances for a job at Kodak" (*id.* at 952). In addition, there was "no evidence * * * that the 'victims' were coerced or threatened by defendants" (*id.* at 954). On those facts, the court of appeals held that the evidence was insufficient to show a fear of economic loss on the part of the applicants. The court indicated, however, that a Hobbs Act conviction will be sustained where "the evidence [is] plain that

nonpayment would result in preclusion from or diminished opportunity for some existing or potential economic benefit" (*id.* at 951).

In the present case, there was testimony that petitioner threatened to withhold work from truck drivers who did not pay and that the amount of work offered to each driver increased after payments were made. Indeed, as noted above, Michael McPaul specifically testified that he believed that if he did not pay petitioner, his employment would be adversely affected (C.A. App. A112). In light of that evidence, petitioner's conviction is not at odds with *Capo*.

2. Petitioner also argues (Pet. 24-28) that the evidence was insufficient to show that the extortion affected interstate commerce. That claim likewise lacks merit.

Under the Hobbs Act the government is required to prove that the alleged extortion "obstruct[ed], delay[ed], or affect[ed]" interstate commerce "in any way or degree." As this Court has made clear, that statutory language manifests a congressional purpose "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960); see also *United States v. Culbert*, 435 U.S. 371, 380 (1978). In light of Congress's intention to invoke the full breadth of its commerce power, the courts of appeals in Hobbs Act cases have uniformly held that the magnitude of the effect on commerce is immaterial and that even a de minimis or potential impact on commerce is sufficient. See, e.g., *United States v. Tuchow*, 768 F.2d 855, 870 (7th Cir. 1985); *United States v. Billups*, 692 F.2d 320, 331 n.7 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983); *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982); *United States v. Zemek*, 634 F.2d 1159, 1173 n.20 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); *United States v. Rabbitt*, 583 F.2d 1014,

1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States v. Harding*, 563 F.2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975).

In this case, the victim truck drivers were directly involved in moving goods in interstate commerce. For instance, Michael McPaul and Robert Long testified that they had driven from Pennsylvania to Ohio and West Virginia in the course of their employment (C.A. App. A126, A171-A172). Moreover, the drivers performed work for a company that regularly conducted business in interstate commerce (*id.* at A83-A85, A105). And the extortionate payments that the drivers made to petitioner reduced the compensation that they received for their labor in interstate commerce and thus amounted to a form of commission for securing that employment. Consequently, the jurisdictional element of the Hobbs Act was satisfied.

The Seventh's Circuit's decision in *United States v. Mattson*, 671 F.2d 1020 (1982), upon which petitioner relies (Pet. 25-28), is not to the contrary. In *Mattson*, city employees extorted money from a building maintenance worker in connection with his application for an electrician's license. The government argued that Hobbs Act jurisdiction existed because the issuance of the license would have affected the financial condition of the worker's employer and his outside electrical contractor (on whom the employer would no longer need to rely). In rejecting that argument, the court concluded that interstate commerce would not be affected because the worker himself "was not conducting a business engaged in, or purchasing items from, interstate commerce" and his employer never reimbursed him for the extorted payments he made to the defendant (*id.* at 1025). Here, in contrast, the drivers were personally involved in activity affecting interstate commerce. Accordingly, this case does not conflict with *Mattson*.⁷

⁷ Indeed, in a post-*Mattson* case, the Seventh Circuit upheld a Hobbs Act conviction where the impact on commerce was very

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

DECEMBER 1987

similar to that involved here. See *United States v. Anderson*, 809 F.2d 1281 (1987) (payments by truck drivers to fix tickets for driving while intoxicated affected commerce because of the increased likelihood that the drivers would be on the roads in the future). Other post-*Mattson* Seventh Circuit cases have reaffirmed that even a de minimis or potential impact on commerce is sufficient. See, e.g., *United States v. Murphy*, 768 F.2d 1518, 1530-1531 (1985) (payments left attorneys with less money to purchase envelopes, stationery, and law books from outside the state), cert. denied, 475 U.S. 1012 (1986); *United States v. Boulahanis*, 677 F.2d 586, 589 (social club's extortion payments left it with less money from which to spend its customary \$68 per month on coffee from out of state), cert. denied, 459 U.S. 1016 (1982).

